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91-892

No.: _____

IN THE

Supreme Court of the United States

October Term, 1991

BROOKS DAVIS and MARY FERGUSON DAVIS,
Petitioners,

-against-

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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QUESTIONS PRESENTED

This petition presents an open question regarding the Jury Selection and Service Act of 1968, 28 U.S.C. § 1861-69 (1982): whether the Act authorizes a jury clerk to excuse from service on a particular panel to which he has been assigned, rather than from jury duty in general, a prospective juror who has not requested to be excused from jury duty in general, due to the anticipated length of the trial.

This petition also presents the undecided question of whether an Assistant United States Attorney, who has justified the declaration of a mistrial on the basis of his need to present certain evidence which he could not present at the original trial, is required to present at re-trial the evidence which formed the basis of his need to have a mistrial of the first trial declared.

This petition addresses whether the double jeopardy clause is violated if it is

determined that the Assistant United States Attorney never in fact possessed the evidence which he claimed necessitated the declaration of a mistrial.

Finally, this petition addresses whether a Circuit Court of Appeals should be ordered to address issues of constitutional magnitude, discussed in depth in appellants' brief, but left unaddressed in its opinion and order. It is the position of this petition that this Court either should order that the Second Circuit address these issues, or this Court should address them as they address issues of constitutional magnitude.

TABLE OF CONTENTS

TABLE OF CONTENTS TO APPENDIX

TABLE OF AUTHORITIES

CASES

STATUTES and CONSTITUTIONAL PROVISIONS

TO THE HONORABLE, THE CHIEF JUSTICE OF THE UNITED STATES AND THE ASSOCIATE JUSTICES OF THE UNITED STATES SUPREME COURT.

Petitioners Brooks Davis and Mary Ferguson Davis respectfully request that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit, which affirmed their convictions in the United States District Court for the Southern District of New York.[1]

OPINIONS BELOW

On March 4, 1991, the United States Court of Appeals for the Second Circuit ruled that it was not a violation of the Jury Selection and Service Act of 1968, 28 U.S.C. §§ 1861-69 (1982) for the jury clerk to excuse a venireman from serving on a particular panel to which

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[1] Brooks Davis hereinafter is referred to as "Mr. Davis" or "Brooks Davis." Mary Ferguson, a/k/a Mary Davis (her name after her second marriage), a/k/a Mary Johnson (her maiden name) is referred to hereafter as "Mrs. Davis."

he has been assigned, after he has not requested a general excuse from jury duty.

The Second Circuit also held that Mrs. Davis' right to be free from double jeopardy, and the Court's prior decision denying her motion to dismiss the indictment for violation of that right, were not impacted by the government's perjurious proffer in opposition to Mrs. Davis' original motion to dismiss the indictment.

The Court did not address many important constitutional issues which had been briefed and argued in depth.

The Second Circuit denied the Motion for Rehearing and Suggestion for Rehearing En Banc filed by Mr. and Mrs. Davis. The Davises now bring this Petition for a Writ of Certiorari.

JURISDICTION

Jurisdiction is invoked pursuant to 28 U.S.C. § 1254.

CONSTITUTIONAL PROVISIONS INVOLVED

Constitution of the United States, Amendment V:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time or War or public danger; nor shall any person be subject for the same offence to twice be put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

STATEMENT OF THE CASE

At issue here are several undecided issues of constitutional magnitude. First, the petition addresses whether the Jury Selection and Service Act of 1968, 28 U.S.C. § 1861-69 (1982), authorizes a jury clerk to excuse from service on a particular panel to which he has been assigned, due to the anticipated length of the trial, a prospective juror who has not re-

quested a hardship excuse from jury duty in general. Mr. and Mrs. Davis contend that the Act authorizes the clerk to excuse a person summoned for jury duty from jury service in general for hardship reasons. However, the jury clerk engages in voir dire, beyond the authority granted a clerk and in violation of the constitutional rights of a defendant, when he or she excuses a prospective juror from a panel to which he or she has been assigned, and sends him or her back into the general jury room for selection onto another panel.

This petition also addresses whether an Assistant United States Attorney, who has justified the declaration of a mistrial on the basis of his need to present certain evidence which he could not present at the original trial because the evidence related to current trial counsel, is required to present at retrial the evidence which he claimed necessitated the mistrial. In this case, Assistant United States Attorney Daniel Richman justified

the declaration of a mistrial as to Mrs. Davis, who was not implicated in the acts of witness intimidation justifying the mistrial of her co-defendants, on the basis of acts he claimed would tie Mrs. Davis to witness intimidation. It was Mr. Richman's position that he would thereby show witness intimidation to be an object of the main conspiracy anticipated by the alleged conspirators. No evidence tying Mrs. Davis to these acts ever was introduced at re-trial and, in fact, the grand jury indicted Mrs. Davis' co-defendants, but not Mrs. Davis, in a separate conspiracy to obstruct justice. It is Mrs. Davis' contention that, having justified a mistrial on his need to present certain evidence, the Assistant United States Attorney was required to introduce that evidence. His failure to do so violated Mrs. Davis' right to be free from double jeopardy.

Also at issue is whether the double jeopardy clause is violated if it is determined that the Assistant United States Attorney never

in fact possessed the evidence which he claimed necessitated the declaration of a mistrial. After his proffer to the Court of Appeals, that he would introduce evidence tying Mrs. Davis to threats to murder two prosecution witnesses, who recanted their testimony as a result of those threats, Assistant United States Attorney Richman stated at the sentencing of one of those witnesses that he was assuming that the witness had recanted due to promises or threats from some of his former criminal associates. The Assistant United States Attorney stated that it was "a very fair inference that Mr. Mitchell chose to renege on his agreement because of promises from his criminal associates, or just a simple desire to realign himself with them. ..." The Assistant United States Attorney went on to state that "if at some point Mr. Mitchell wishes to indicate that he was intimidated into making this recantation, he will have every opportunity, if he wishes, to come forward and make that known to the govern-

ment and to this court. Until he does he should be treated as somebody who voluntarily aligned himself with a vast narcotics conspiracy and with the efforts of that conspiracy to impede the progress of the trial before your honor." (emphasis supplied)

The statement by the Assistant United States Attorney that it was a "fair inference" that the Mitchell had revoked his cooperation because of threats belied his testimony to the Second Circuit that his witnesses would tie Mrs. Davis to the intimidation of Mitchell. This statement was made by the Assistant United States Attorney two months after he had represented to the district court that his confidential informant had implicated Mrs. Davis in a scheme to intimidate Mr. Mitchell and Keith Greene, and that Mitchell's decision to rescind his cooperation was a result of those threats. The assertion that there he was acting on a "fair inference" was a far cry from his allegation that he anticipated such testimony from

a reliable confidential informant.[2] The proffer was an assumption, couched in the terms of a certainty. An assumption, even a "fair" one, does not provide the manifest necessity required before the government can demand a mistrial, as required by the fifth amendment to the United States Constitution.

Finally, this petition addresses whether a Circuit Court of Appeals should be ordered to address issues of constitutional magnitude, discussed in depth in appellants' brief, but left unaddressed in its opinion and order.

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[2] As the Second Circuit noted in United States v. Davis, the government's original proffer, made in support of its motion to revoke the bail of all of the defendants, claimed that the confidential informant had implicated Wayne Davis and Claddis Arrington in the acts of witness intimidation. Mary Davis was not mentioned in that proffer. 845 F.2d 412, 413 (2d Cir. 1988). At a later proffer, Mrs. Davis' name was miraculously added to the list. That proffer was repeated in the Second Circuit when the Assistant United States Attorney was required to provide evidence that the declaration of mistrial was warranted.

REASONS FOR GRANTING THE WRIT

DOUBLE JEOPARDY.

On October 21, 1987, arrest warrants for over a dozen individuals charged this case were executed throughout New York. Informed that he was wanted by federal authorities, Brooks Davis flew to New York from Florida and surrendered to federal marshals. He was denied bail and has since been in federal custody.

The ensuing indictment charged a variety of narcotics related offenses, and an over-arching conspiracy. On December 10, 1987, a superseding indictment named Mrs. Davis a defendant in the narcotics conspiracy. She surrendered to federal authorities and was granted pretrial release.

Trial was scheduled for April 11, 1988. On the evening of April 9, 1988, Isaac Diggins, a prospective witness, was shot while selling crack and cocaine in Harlem. Aaron Harper was questioned by the government about his role in

setting up Diggins' shooting, at which time he allegedly claimed to have done so under duress from Claddis Arrington.[3] The Court remanded Arrington, Wayne Davis,[4] and Mary Davis, based upon the government's proffer that a confidential informant, later identified as Harper, had linked them to a plot to silence witnesses. The trial continued for several weeks.[5]

On April 11, 1988, the first day of trial, Harper was inadvertently placed in a holding cell at the Metropolitan Correctional Center (MCC) with Brooks Davis, Arrington, and Wayne Davis. Brooks Davis allegedly told Harper that his (Davis') attorney would visit him

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[3] Claddis Arrington, a co-defendant in this case, was charged with having arranged the shooting. He was acquitted of that charge.

[4] Brooks Davis and Wayne Davis are not related.

[5] On an expedited appeal, the Second Circuit held that Arrington's, Mrs. Davis' and Wayne Davis' bail should not have been revoked before they were afforded an opportunity to present evidence to counter the government's proffer. United States v. Davis, 845 F.2d 412 (2d Cir. 1988).

(Harper). The following day Robert Simels, then the attorney for Brooks Davis, interviewed Harper and subsequently produced before the District Court an affidavit signed by Harper. In that affidavit, Harper claimed to have been coerced by the government's promises (after nine hours of uncounselled interrogation during which time he was deprived of food) into making statements implicating the various defendants in the Diggins shooting.

Confronted by the government with this affidavit, Harper claimed to have made it under duress from Simels. The Court ruled that allegations of threats from the three defendants and Attorney Simels would be admissible against all four defendants. Wayne Davis and Arrington stated that they wished to cross-examine Harper with the affidavit procured by Simels, and to call Simels as a witness to rebut Harper's anticipated claim of intimidation. Brooks and Mary Davis offered to waive that right in order to continue with the trial. On April 28, 1988,

the Court declared a mistrial as to Wayne Davis and Claddis Arrington. The trial continued as to Brooks and Mary Davis.

On May 2, 1988, over strenuous objection, the Court declared a mistrial as to Brooks and Mary Davis, finding that Simels could not continue his role of representing Brooks Davis without becoming an unsworn witness, whose credibility would be at issue with regard to Harper's testimony. The Court found manifest necessity to declare a mistrial. All four defendants subsequently moved that their retrial be barred on double jeopardy grounds. The District Court denied that motion, and an expedited appeal was taken to the United States Court of Appeals for the Second Circuit.

On or about November 10, 1988, a three judge panel of that Court heard arguments on defendants' appeal of the mistrial. The Second Circuit noted that the government's brief did not adequately address the admissibility of the proffered evidence of the Harper intimidation

with respect to Mary Davis, and the government was unable to articulate a theory of admissibility at that time. The Court ordered that the government submit a letter delineating the basis on which the Harper intimidation evidence was admissible with respect Mrs. Davis, necessitating the declaration of mistrial with respect to her.

The government's submission claimed that evidence of the alleged threat would be admissible against Mrs. Davis under Rule 801(d)(2)-(E) of the Federal Rules of Evidence as the statement of a co-conspirator. The indictment, however, alleged a conspiracy that had terminated on October 21, 1987, with the arrests of the majority of the defendants, nearly five months before the alleged act of witness intimidation, and during which Mrs. Davis was not present. Harper's testimony would have been inadmissible with respect to Mrs. Davis under the theory of co-conspirator liability. The government's submission went on to claim that

"evidence from confidential informants indicat[ed] that, in December of 1987, while released on bail, Mary Davis sought to recruit two criminal associates to help kill Henry Mitchell and Keith Greene -- who, at the time, were known to be cooperating with the Government."[6] The government claimed it would prove that the conspiracy had thus continued beyond the arrest of the defendants, that the evidence was admissible with respect to Mrs. Davis, and that there was a manifest necessity for a dec-

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[6] The government first proffered this evidence to the trial court on April 29, 1988, when it moved to revoke the bail of Wayne Davis and Mary Davis. On the basis of this proffer, the trial court held that there was probable cause to believe that Mrs. Davis was participating in a plot to silence witnesses. At its first proffer on April 11, 1988, however, the government claimed that its confidential informant had implicated only Claddis Arrington and Wayne Davis in the plot to intimidate witnesses. No mention was made of Mrs. Davis' participating in the plot to silence witnesses at that time. See United States v. Davis, 845 F.2d 412, 413 (2d Cir. 1988). At trial, where he testified behalf of the government, Mr. Harper denied even knowing Mrs. Davis, and said he had never heard of her until the government asked him about her during interrogation.

laration of mistrial so that it might have "'one full and fair opportunity to present [this] evidence to an impartial jury.'" (quoting Arizona v. Washington, 434 U.S. 497, 505 (1978)).[7] On the basis of Mr. Richman's proffer, the Second Circuit denied the double jeopardy motion, holding the evidence admissible against Mary Davis. United States v. Arring-

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[7] No evidence connecting Mrs. Davis to any attempts to silence any witnesses was presented at retrial. Harper denied having even heard of Mrs. Davis prior to the time he was visited by Simels. It is unlikely that any evidence that Mrs. Davis was involved in an attempt to silence witnesses was presented to the grand jury which issued a superseding indictment after the mistrial. The superseder included a count of conspiracy to obstruct justice, and substantive counts based on that alleged conduct. Mrs. Davis was not charged in any count relating to the Harper intimidation or named a conspirator in the conspiracy to obstruct justice.

In a post-trial motion Mrs. Davis requested that the trial court re-examine the declaration of manifest necessity for a mistrial in light of the government failure to present any evidence connecting Mrs. Davis to the shooting, or any act of witness intimidation. The Court refused to re-examine the double jeopardy issue, stating that the Court of Appeals had accurately predicted the course of the retrial. United States v. Davis, 718 F. Supp. 8, 10 (S.D.N.Y. 1989).

ton, 867 F.2d 122, 130 (2d Cir.), cert. denied, ___ U.S. ___, 109 S. Ct. ___ (1989).[8]

Retrial began on March 13, 1989. The government contended that Brooks and Mary Davis and their co-defendants were participants in a narcotics enterprise from approximately 1975 until October, 1987. Several drug enforcement

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[8] The statements of Assistant United States Attorney Daniel Richman at Henri Mitchell's sentencing on May 6, 1988, several weeks after the mistrial, proves that his proffer to the district court, which formed the basis of his motion to revoke Mrs. Davis' bail and which was repeated to the Second Circuit to justify the declaration of mistrial, was false.

At Mitchell's sentencing Mr. Richman explained to the court that Mitchell's decision to revoke his cooperation "could only have been done on the basis of threats or promises..." and that it was "a very fair inference that Mr. Mitchell chose to renege on his agreement because of promises from his criminal associates, or just a simple desire to realign himself with them. ..." Mr. Richman went on to state that "if at some point Mr. Mitchell wishes to indicate that he was intimidated into making this recantation, he will have every opportunity, if he wishes, to come forward and make that known to the government and to this court. Until he does he should be treated as somebody who voluntarily aligned himself with a vast narcotics conspiracy and with the efforts of that conspiracy to impede the progress of the trial before your honor."

agents testified to the results of the searches of locations attributed to the defendants, and the results of surveillance and tape recordings made by confidential informants. No surveillance, wiretap or tape recording connected Brooks or Mary Davis to any narcotics. No drugs were found during the search of their home in Port Orange, Florida. However, six immunized witnesses testified to their own participation in the narcotics business, implicating Brooks and Mary Davis.

JURY SELECTION.

As jury selection commenced, the Court informed the assembled panel that the trial was expected to last six weeks, as they may have been informed in the jury room. At the next sidebar, Mr. Levitt, counsel to co-defendant Wayne Davis, asked the Court if jurors had been able to "opt out downstairs" due to the length of the trial. The Court confirmed that there had been "pre-screening" and that two jurors

had been excused before reaching the courtroom. Defense counsel objected to this procedure, and moved to strike the panel. The Court overruled the objection, and jury selection continued. At this time, no jurors had been selected and few had been questioned.

During jury selection, six prospective jurors requested hardship excuses due to the anticipated length of the trial. The Court granted only one such excuse. After extensive questioning and consultation with the attorneys for all parties, the Court ultimately excused two additional prospective jurors due to their inability to sit the length of the trial.

A few weeks after the jury verdict, the United States Supreme Court rendered its unanimous decision in Gomez v. United States, ___ U.S. ___, 109 S. Ct. 2237 (1989), which held that the District Court could not delegate to a Magistrate its exclusive jurisdiction to preside of jury selection in a felony trial. On

the basis of this decision, Brooks and Mary Davis sought a new trial.

At sentencing, the Court denied the Motion for a New Trial, explaining that he had asked the Clerk to "screen out" prospective jurors who could not serve on a six-week trial. The Court viewed this as an "administrative" matter, and concluded the at the New Trial Motion before him was without merit.

ARGUMENT

POINT I.

THIS COURT SHOULD DETERMINE WHETHER THERE IS AUTHORITY FOR A JURY CLERK TO EXCUSE A PROSPECTIVE JUROR FROM A PARTICULAR PANEL, RATHER THAN FROM JURY DUTY IN GENERAL, DUE TO HARDSHIP, AND SHOULD HOLD THAT THERE IS NO SUCH AUTHORITY.

The limits upon a jury clerk's authority to excuse jurors never has been decided by this Court. This case presents an opportunity for this Court to address that important issue.

The Jury Selection and Service Act of 1968, 28 U.S.C.§§ 1861-69 (1982), delineates those hardship excuses that will entitle a citizen to automatic exemption from jury service:

> (c) Except as provided in section 1865 of this title or in any jury selection plan provision adopted pursuant to paragraph (5) or (6) of section 186-3(b) of this title, no person or class of persons shall be disqualified, excluded, excused or exempt from service of jurors: Provided, That any person summoned for jury service may be (1) excused by the court, or by the clerk under supervision of the court if the court's jury selection plan so authorizes,

> upon a showing of undue hardship of extreme inconvenience for such period as the court deems necessary, at the conclusion of which such person either shall be summoned again for jury service ...

28 U.S.C. § 1866)(c) (emphasis supplied).

Thus, under Court supervision and if authorized by the local plan, a clerk may grant a juror a hardship excuse from jury duty in general, for a specific period of time. Nothing in the Jury Selection and Service Act authorizes a clerk to excuse a juror from a particular panel and send him or her back into the general pool, for any reason. Mr. and Mrs. Davis contend that such an act is a function of voir dire which a jury clerk, not vested with Article III powers, is not authorized to conduct. See United States v. Barnette, 800 F.2d 1158, 1168 (11th Cir. 1986), cert. denied, 480 U.S. 935 (1987) (where trial judge personally sat upon each request to be excused from the trial due to its anticipated length, and determined each on its merits, Jury Selection and

Service Act is not violated). Here, the Clerk excused jurors from the particular panel sending them back into the general pool, without the supervision of the Court. This exceeded his statutory authority, and violated the Act.

Furthermore, while the Southern District Jury Plan grants general authority over most optional excuses from jury duty, it specifically reserves to the trial judge the authority to grant hardship excuses. The Southern District Plan authorizes "Optional Exemptions" from jury duty to:

(1) Persons over 70 years of age;

(2) Persons having legal custody and active daily care of a child or children under the age of 12 years; or who are essential to the daily care of aged or infirm persons;

(3) Persons who have served for 30 days as Grand Jurors or for 2 weeks as Petit Jurors in a state or federal court within the past 2 years;

(4) Volunteer safety personnel who serve without compensation as firefighters or members of a rescue squad or ambulance crew for a public agency;

(5) <u>Persons as to whom a judge finds</u>, for reasons other than the foregoing,

> that jury service would constitute undue hardship or extreme inconvenience.

(emphasis supplied). While the Southern District Plan permits optional exemptions for a number of reasons, no authority is given to excuse a juror due to the length of the trial. Only a judge is authorized to rule on hardship excuses not specifically delineated in the Plan and thus, under the Southern District Plan, only the district court judge may excuse a juror from jury duty for hardship reasons. There is no authorization in the Southern District Plan or the Jury Selection Act for a clerk to conduct a mini-voir dire of jurors to determine whether, due to the projected length of the trial, a juror should be sent back to the main jury room for inclusion on a different panel for any reason.

The jury clerk's authority to grant a hardship excuse ends when the juror has not requested to be excused from jury duty in general, and has been assigned to a particular ven-

ire.[9] The juror must address his desire to be excused from a particular trial to the judge, in the presence of counsel. The clerk may no more excuse the potential juror due to the length of the trial, than he may excuse him because he cannot be impartial when the defendant is a fellow police officer, or because he has been over-exposed to pre-trial publicity. Excuses which send the juror back into the general jury room for inclusion in a new panel, rather than out the courthouse door, are the province of voir dire. An excuse that deals with the suitability of a particular juror for a particular trial requires evaluations and

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[9] In its ruling, the Second Circuit held that "[v]oir dire is conducted by the judge in the courtroom, not by the clerk in the central jury room." That is exactly the point made by appellants. A jury clerk's ability to excuse a prospective juror due to hardship is limited to his right to grant an excuse from jury duty <u>in</u> general to a citizen who, due to hardship, cannot meet his or her obligation as a citizen to serve on <u>any</u> jury. The jury clerk may excuse a person from jury service for a particular period of time, "at the conclusion of which such person either shall be summoned again for jury service ..."

value judgments that a jury clerk is prohibited from making.

That the granting and denying of hardship excuses is a non-ministerial function is evidenced by the trial judge's own treatment of the hardship excuses presented to him. As was noted above, the Court initially denied five of the six hardship excuses presented to him. Only after consultation with all parties were two additional excuses granted, one in deference to defense counsel. The Court's painstaking review of these excuses belies any argument that sitting on them and determining their merits is a ministerial function within the province of a court clerk.

The District Court improperly delegated a non-delegable judicial responsibility to a court officer with only ministerial and clerical authority, in a manner incapable of review. The Jury Selection and Service Act and the Southern District Jury Selection Plan were

violated, requiring that the Davises be afforded a new trial.

In Gomez v. United States, ___ U.S. ___, 109 S. Ct. 2237 (1989), this Court emphasized the importance of the jury selection process, and held that a District Court Judge may not, over objection, delegate his exclusive authority to select a jury to a Magistrate. 109 S. Ct. at 2248. The Court concluded that jury selection, as an integral and critical component of a felony trial, can only be conducted by a person with jurisdiction to preside over a felony trial. After a detailed analysis of the Federal Magistrates Act, the Court concluded that federal magistrates lack such jurisdiction.[10] The Court, rejecting the government's argument that the Gomez defendants had suffered no prejudice from the magistrate conducting the voir dire, held:

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[10] It goes without saying that the jury clerk lacks the authority to conduct a felony trial.

> Among those basic fair trial rights that "can never be treated as harmless" is a defendant's "right to an impartial adjudicator, be it judge or jury." Equally basic is a defendant's right to have all critical stages of a criminal trial conducted by a person with jurisdiction to preside. Thus, harmless-error analysis does not apply in a felony case in which, despite a defendant's objection and without any meaningful review by a district jury, an officer exceeds his jurisdiction by selecting a jury.

109 S. Ct. at 2248. This Court thus unanimously reversed the Second Circuit's order of affirmance. It follows a fortiori that the authority that may not be delegated to a magistrate cannot be delegated to a court clerk, in the absence of statutory authority.

Finally, as was noted in Gomez v. United States, 490 U.S. 858, 109 S. Ct. 2237 (1989), harmless error does not apply to a violation of the Jury Selection and Service Act, especially where the appellant and reviewing court are

precluded from reviewing the decisions of the presiding officer. 109 S. Ct. at 2248.[11]

This Court should decide this important issue, which it has not previously addressed, and hold that the Jury Selection and Service Act was violated when the jury clerk conducted a "mini-voir dire."

POINT II:

THIS COURT SHOULD DETERMINE THAT THE DOUBLE JEOPARDY CLAUSE IS VIOLATED WHEN A PROSECUTOR JUSTIFIES THE FINDING OF MANIFEST NECESSITY FOR A MISTRIAL UPON HIS NEED TO PRESENT CERTAIN EVIDENCE AND THEN FAILS TO PRESENT THAT EVIDENCE.

Another issue yet undecided by this court is whether a prosecutor who justifies "manifest necessity" for declaration of a mistrial upon his need to present certain evidence is required to present that evidence

[11] Among the reasons advanced by the Supreme Court in Gomez was that there was no reasonable opportunity for the Trial Court to review the Magistrate's jury selection determinations. Here, with no record made of the Clerk's determinations or the reasons advanced by the excused jurors, review was impossible.

at retrial. There is only one reported case on this issue, United States v. Posner, 780 F.2d 1536, 1540 (11th Cir.), cert. denied, 476 U.S. 1182 (1986), which is discussed below.

The double jeopardy clause of the United States constitution was designed to prevent the prosecution from provoking a mistrial to afford itself a better opportunity to obtain a conviction, United States v. Ruggiero, 846 F.2d 117, 123 (2d Cir.), cert. denied, ___ U.S. ___, 109 S. Ct. 491 (1988), and to prevent the defense from losing an opportunity to obtain a favorable verdict. United States v. Buljabasic, 808 F.2d 1260, 1266 (7th Cir.), cert. denied, ___ U.S. ___, 108 S. Ct. 67 (1987). For that reason, when it moves for mistrial over a defense objection, the government bears the heavy burden of demonstrating a "manifest necessity" to do so. Arizona v. Washirgton, 434 U.S. 497, 505 (1978).

The acts of intimidation which necessitated the declaration of mistrial as to Mrs. Davis' co-defendants occurred three months after

the defendants had been arrested and incarcerated, and at least two months after they had been indicted.[12] Mrs. Davis was not present when the acts allegedly occurred, and is not alleged to have known of them. Because a conspiracy terminates with the arrests and incarceration of its participants, Krulewitch v. United States, 336 U.S. 440, 442, 69 S.Ct. 716, 717 (1949); United States v. Goff, 847 F.2d 149, 169-70 (5th Cir.), cert. denied, ___ U.S. ___, 109 S.Ct. 324 (1988); Woodring v. United States, 367 F.2d 968, 969 (10th Cir. 1966), and because acts of concealment alone do not extend the life of a conspiracy which has terminated, the Second Circuit, at arguments on Mrs. Davis' double jeopardy motion, queried the government on the admissibility of such acts against Mrs. Davis. See Krulewitch v. United States, supra, 336 U.S. at 442-43, 69 S.Ct. at 718; Grunewald

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[12] They also occurred several weeks before the government decided to request the mistrial, after several weeks of testimony.

v. United States, 353 U.S. 391, 405, 77 S.Ct. 963, 974 (1957) (where no agreement to conceal the conspiracy as part of the main conspiracy could be shown, duration of the conspiracy cannot be lengthened by acts of concealment).

Mr. Richman was unable to articulate a theory of admissibility during the arguments. The Second Circuit thus afforded both Mr. Richman the opportunity to submit in writing the theory that justified the mistrial as to Mrs. Davis. Mr. Richman noted that the government is entitled to "one full and fair opportunity to present its case." Id. He added that the government may demonstrate manifest necessity to abort a trial where its ability to do so has been prejudiced by actions of the defense. Id. For that reason, on the basis of Mr. Richman's proffer that evidence would tie Mrs. Davis to the alleged intimidation of other prospective government witnesses, the Second Circuit found that the conspiracy anticipated acts of intimi-

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dation. The attempt to intimidate Aaron Harper was therefore held a part of the charged conspiracy, admissible against all of the conspirators, and the declaration of mistrial had been "manifestly" necessary. United States v. Arrington, 867 F.2d 122, 130 (2d Cir.), cert. denied, ___ U.S. ___, 109 S. Ct. ___ (1989).

The government's representations notwithstanding, however, no evidence that Mrs. Davis was involved in any attempt to silence witnesses, or had ever recruited any person to do so, was introduced at retrial.

Under the law of the case doctrine, a Court will adhere to its prior decisions unless reconsideration is mandated by an intervening change in controlling law, new evidence, or to correct a clear error of law or to prevent manifest injustice. United States v. Agabite, 877 F.2d 174, 178 (2d Cir. 1989). Where, as here, the government intentionally misleads the Court as to what it will be able to establish through its witnesses on retrial, the double

jeopardy clause is violated. United States v. Posner, 780 F.2d 1536, 1540 (11th Cir.), cert. denied, 476 U.S. 1182 (1986). Such a determination cannot be made until the completion of retrial after remand, and the law of the case doctrine is not controlling.

In United States v. Posner, supra, a hearing pursuant to United States v. James, 590 F.2d 575 (5th Cir.), cert. denied, 442 U.S. 917 (1979), was held prior to trial, to determine the admissibility of a letter written by Posner's co-defendant, which the government sought to introduce into evidence. At the hearing, the government outlined the evidence on which it anticipated it would rely in order to establish the letter's admissible as a co-conspirator declaration in furtherance of the conspiracy. 780 F.2d at 1538. On the basis of the government's proffer, the trial court allowed this anticipated proof to await full development at trial.

Later, however, the Court found that the government had met its preliminary burden of proving a conspiracy and the defendants' participation in it, but had failed to establish a sufficient nexus between the letter and the objects of the conspiracy. The Court found the letter was inadmissible with respect to Posner, and prejudicial to an extent that could not be cured by a limiting instruction. Posner requested a severance, and mistrial was granted. 780 F.2d at 1539. Subsequently, Posner moved that his retrial be barred on double jeopardy grounds, as the prosecution had failed to put forth the proof it claimed in its proffer would tie the evidence to the conspiracy, provoking Posner into requesting a mistrial. The Court of Appeals for the Eleventh Circuit held that Posner should have first moved in the district court for an evaluation of his double jeopardy in light of the government's failure to introduce the evidence it claimed would tie the letter to Posner. See United States v. Posner,

764 F.2d 1535, 1539 (11th Cir. 1985) (the appellate decision before the remand and re-trial). After remand, the trial court held:

> It is true that this Court expected the government to put on testimony that would more fully support its theory that [co-defendant's] letter was written in furtherance of the conspiracy. ... Although the government's witnesses did not establish that the letter was written in furtherance of the conspiracy, the Court has found no evidence that the government proceeded in bad faith in trying to get the letter admitted. Nor has it found evidence that the government intentionally misled the Court as to what it would be able to establish through its witnesses.

780 F.2d at 1540 (emphasis supplied). On that basis, the Eleventh Circuit affirmed the denial of Posner's double jeopardy argument.

In this case, the government argued in its appellate brief that its decision not to attempt to prove the substance of their proffer is not evidence that the evidence did not ex-

ist.[13] We recognize that, as a general rule the determination of what evidence will sufficiently state its case is a matter left to prosecutorial discretion, subject to the Court's ruling on a challenge to the legal sufficiency of the evidence. However the decision not to present evidence which formed the basis of the prosecution's opposition to, and defeat of, Mrs. Davis' double jeopardy motion, demonstrates that the necessity mandating the mistrial with respect to her was far from "manifest." After obtaining a mistrial, justified by his express need to introduce evidence against Mrs. Davis, Mr. Richman should be estopped from arguing he was not required to

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[13] At sentencing, the district court ruled that the conduct involved in Count I, the narcotics conspiracy of which Mrs. Davis was convicted, ended on October 21, 1987, when the majority of the defendants were arrested, prior to any alleged acts of witness intimidation. The district court also amended Mrs. Davis' presentence report to state that there was no claim that she had been involved in the arranging for the shooting of a witness, with which her co-defendants had been charged, and of which they were acquitted.

introduce it. It is logically inconsistent, intellectually dishonest, and a violation of double jeopardy principles, for the government to claim that it was not necessary to present this evidence at retrial after having justified its "manifest necessity" to abort the first trial in order to present that very evidence.

Here, the government intentionally misled the Court with regard to what it would be able to establish through its witnesses at retrial. The government's proffer that a confidential informant had linked Mrs. Davis to acts of witness intimidation was a fallacious attempt to justify after the fact the erroneous declaration of mistrial with respect to her, and thereby defeat her double jeopardy arguments. The government failed to present the evidence upon which its prediction that the threat against Harper would be admissible against Mrs. Davis was predicated, and upon which Mrs. Davis' double jeopardy motion was

denied. Its failure to do so is prima facie proof that it had no such evidence.

Unlike Posner, supra, where the defense claimed it was goaded into moving for a mistrial, Mrs. Davis vigorously opposed a declaration of mistrial, only to have it thwarted by a false proffer in support of a manifest necessity argument. The government's obligation to act in good faith when it makes claims about what it will establish through its witnesses on retrial must therefore be doubly scrutinized. Manifest necessity should not be premised upon wishful thinking, or any prosecutor would be able to declare a mistrial on the basis of hypothetical evidence in order to abort a losing or unprepared trial.

By contrast to United States v. Posner, supra, in which the government failed to introduce sufficient evidence to tie the proffered evidence to the defendant, the government here failed to introduce any evidence tying Mrs. Davis to the proffered evidence. In the ab-

sence of any attempt to tie Mrs. Davis to this evidence, there can be no argument that a good faith effort had been made, as was found in Posner. Without evidence tying Mrs. Davis to any act of witness intimidation, the conspiracy cannot be held to have anticipated acts of concealment, and the Second Circuit would have been required to grant Mrs. Davis' motion to dismiss the indictment on double jeopardy grounds.

This Court should grant certiorari in order to do the same.

POINT III:

THIS COURT SHOULD DETERMINE THAT THE DOUBLE JEOPARDY CLAUSE OF THE FIFTH AMENDMENT IS VIOLATED WHEN THE GOVERNMENT JUSTIFIES A DECLARATION OF MISTRIAL ON THE BASIS OF AN INTENTIONALLY FALSE PROFFER.

Counsel has discovered no case in which an Assistant United States Attorney made false statements to a Circuit Court of Appeals in order to validate the district court's grant of his motion for a mistrial. This Court should

address the issue of whether such an action violates the double jeopardy clause of the fifth amendment.

The statements by Mr. Richman, that it was a fair inference that the Mitchell had revoked his cooperation because of threats, came nearly two months after Mr. Richman's representations to the district court that his confidential informant had implicated Mrs. Davis in a scheme to intimidate Mr. Mitchell and Keith Greene and that Mitchell's decision to rescind his cooperation was a result of those threats, and was a far cry from it. The proffer to the district court, which Mr. Richman claimed justified the mistrial, was an assumption, couched in the terms of a certainty.[14] That proffer was

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[14] It should also be noted that Aaron Harper was identified as the "confidential informant" who gave the information contained in these proffers. See United States v. Arrington, 867 F.2d 122, 124 (2d Cir.), cert. denied, ___ U.S. ___. 110 S. Ct. 79 (1989) As the government admits, Mr. Harper had nothing to say about Mrs. Davis and, at trial, testified that he did not even know of her existence until questioned by the government.

reiterated in the government's additional submission to the Court of Appeals, and formed the basis of this Court's decision denying Mrs. Davis' double jeopardy appeal. **That proffer was false when made. That is was repeated did not make it true. It simply made it more dangerous.**

The government claimed that the Second Circuit's failure to make specific reference to the government's submission in its decision denying Mrs. Davis' double jeopardy motion evinces that the Court's decision was not based upon that submission.[15] That decision, however,

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[15] The government acknowledged that, during the interlocutory appeal of the district court's denial of the Davis' double jeopardy motion, the Second Circuit ordered the government to submit a letter setting forth the reasons Aaron Harper's testimony about the alleged threat by Robert Simels would be admissible against Mary Davis. It can be presumed that the Court ordered additional submissions so that it could rule on Mrs. Davis' double jeopardy argument, and not for the sake of intellectual exercise.

The government's submission noted that the district court had revoked Mrs. Davis' bail because of his finding of "probable cause" to believe that she had participated in a conspir-

(continued...)

made specific reference to the recantations of Henri Mitchell and Keith Greene, United States v. Arrington, supra, 867 F.2d at 124, which are the basis of the government's second submission, and which are referred to only in that submission. The prosecution's representation that those recantations were spurred on by Mrs. Davis' alleged acts of witness intimidation form the basis of the Second Circuit's decision that the narcotics conspiracy was furthered by and contemplated the intimidation of witnesses. It was the basis of this Court's ruling that the intimidation of Aaron Harper was admissible with respect to Mrs. Davis when only her co-defendants were implicated directly.[16]

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[15](...continued)
acy to obstruct justice. As the government notes, this was based upon the government's proffer that a confidential informant had implicated her in a conspiracy to recruit associates to murder two government witnesses. The government claimed that it was necessary to have a new trial in order for it to try all of the charges against the defendants at one trial.

[16] Furthermore, counsel cannot recall any decision in which the reviewing court noted
(continued...)

The only way for the government to overcome the presumption that the conspiracy had ended with the arrests of its participants, three months before the alleged acts of witness intimidation, and to defeat Mrs. Davis' first double jeopardy motion, was to show that the narcotics conspiracy anticipated acts of concealment. That was accomplished by the false proffer implicating Mrs. Davis in acts of intimidation.[17]

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[16](...continued)
which submissions formed the basis of its determinations.

[17] It is thus extremely pertinent that the government did not introduce evidence tying Mrs. Davis to witness intimidation to the grand jury. Although the superseding indictment had already issued at the time of the arguments on the first double jeopardy motion, the government neglected to inform the Court that the grand jury had indicted Mrs. Davis' co-conspirators in a separate conspiracy to obstruct justice, encompassing the acts of concealment at issue, and declined to indict Mrs. Davis as a co-conspirator. The acts of witness intimidation at issue (the only such acts ascribed to this group) occurred after the arrests of its participants, and were charged as a separate conspiracy.

By alleging that all of the conspirators engaged in post-arrest acts of concealment, the government overcame the presumption that the conspiracy had terminated three months earlier. There can have been no other basis for such a ruling. Without that false proffer, under all precedent, this Court could not have found that the conspiracy anticipated acts of concealment, mandating that Mrs. Davis' motion to have the indictment dismissed with prejudice on double jeopardy grounds be sustained.

POINT IV:

THE SECOND CIRCUIT SHOULD BE ORDERED TO ADDRESS SEVERAL IMPORTANT ISSUES RAISED IN APPELLANTS' BRIEF.

Finally, it is the Davises' contention that the Due Process Clause of the Fifth Amendment to the United States Constitution requires that the Court of Appeals address issues of constitutional magnitude argued in their brief.

One issue left unaddressed which was of particular importance concerned the impropriety

of the government's argument to the jury that the fact that a number of co-defendants had pled guilty to the same indictment was evidence that the entire indictment was true. It is well established that a co-defendant's guilty plea can never be used as evidence that the defendants on trial are also guilty. United States v. Christian, 786 F.2d 203, 214 (6th Cir. 1986); see also United States v. Viglia-tura, 878 F.2d 1346, 1348 (11th Cir. 1989) (guilty plea of co-defendant may not be used as substantive evidence of guilt). This statement deprived Brooks and Mary Davis and their due process right to a fair trial by depriving them of their right to have their criminal culpa-bility determined individually.

Another issue not addressed was the trial judge's insertion of his own conduct and credibility as issue at trial. He made himself a witness for the government and against the Davises when he insisted upon personally ap-prising the jury of the facts as he saw them

when he decided to release Aaron Harper on bail: that he released Harper despite the Court's trepidation that he would be harmed if released.[18] In fact, informing the jury that Harper presented no danger to the community amounted to the Court vouching for this witness.

One of the most important issues related to actions of the Court which deprived the jury of its fact finding function. One matter in dispute in the case was a debt of Two Thousand Four Hundred ($2,400.00) Dollars owed by Charles Williams to Brooks Davis. Williams claimed that he owed the money for for drugs he claimed Mr. Davis had given him on credit. Williams claimed the debt arose after police officers stole the money from him. Davis

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[18] The idea that Brooks and Mary Davis were violent people was exacerbated by the Court allowing Walter Centano to testify that the government had determined that he was in danger, without clarifying that the danger was from someone named Tippy Wheelings, and not from any of the defendants on trial.

claimed the money owed was for bail he had posted on behalf of Williams, who was his half-brother. When cross-examined about the fact that Davis had, in fact, posted his $2,400 bail, Williams claimed there were two separate debts for the same amount of money: one for bail and the other for drugs. Sua sponte, the trial judge apprised the jury that Charles Williams owed Brooks Davis two separate debts, each for $2,400.00. This was tantamount to informing the jury that Williams owned Davis a drug debt. This gave Williams' testimony about Brooks and Mary Davis the Court's seal of approval and further informed the jury that the Court considered the defendants guilty of participating in the narcotics conspiracy.[19]

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[19] It may be possible in less egregious circumstances for the Court to cure such prejudice by instructing the jury that the Court has no opinion as to what their verdict should be. United States ex rel. Eccleston v. Henderson, 534 F. Supp. 813, 818 (E.D.N.Y.), aff'd without opinion, 697 F.2d 289 (2d Cir. 1982), cert. denied, 459 U.S. 873 (1983). The Court refused to do even this, leaving the jury with the strong impression that the Court believed

(continued...)

This cause should thus be remanded to the Second Circuit, which should be compelled to address these issues, so that Mr. and Mrs. Davis are not deprived of due process of law under the Fifth Amendment. In the alternative, this Court should address these important issues itself.

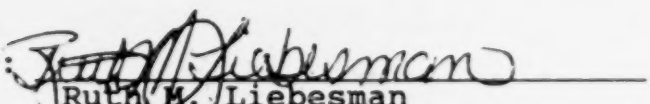
CONCLUSION

For the foregoing reasons, a Writ of Certiorari should be issued.

Dated: New York, New York
August 20, 1991

Respectfully submitted

BROOKS DAVIS & MARY FERGUSON DAVIS,

By: 

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[19](...continued)
that Brooks and Mary Davis were guilty as charged. These errors contributed to the verdict, and mandate its reversal.

APPENDIX

OPINION OF UNITED STATES COURT OF APPEALS

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

Nos. 11, 12, 13—August Term, 1990

(Argued October 1, 1990 Decided March 4, 1991)

Docket Nos. (89-1504 L), 89-1522, 89-1523, 89-1524

UNITED STATES OF AMERICA,

Appellee,

—v.—

CHARLES WILLIAMS, *et al.*,

Defendants,

CLADDIS ARRINGTON, MARY FERGUSON, a/k/a "MARY DAVIS", a/k/a "MARY JOHNSON", and BROOKS GREGORY DAVIS,

Defendants-Appellants.

Before:

FEINBERG, VAN GRAAFEILAND and KEARSE,
Circuit Judges.

Appeals from judgments of the United States District Court for the Southern District of New York (Griesa, J.) convicting defendants-appellants of narcotics conspiracy and associated crimes. Affirmed.

DANIEL C. RICHMAN, Assistant United States Attorney for the Southern District of New York, New York, New York (Otto G. Obermaier, United States Attorney for the Southern District of New York, Alexandra Rebay and Joan McPhee, Assistant United States Attorneys, New York, New York, of counsel), *for Appellee.*

RICHARD B. LIND, New York, New York, *for Defendant-Appellant Arrington.*

RUTH M. LIEBESMAN, New York, New York, *for Defendants-Appellants Brooks Davis and Mary Ferguson, a/k/a Mary Davis, a/k/a Mary Johnson.*

VAN GRAAFEILAND, *Circuit Judge*:

Following a ten-week jury trial before Judge Griesa in the Southern District of New York, the above-named defendants-appellants were convicted of conspiring to violate the narcotics laws. 21 U.S.C. § 846. Brooks Davis was also convicted of engaging in a continuing criminal enterprise, 21 U.S.C. § 848(a), travelling in interstate commerce to further a narcotics enterprise, 18

U.S.C. § 1952, using a firearm in a drug trafficking crime, 18 U.S.C. § 924(c), and conspiring to intimidate a prospective witness, 18 U.S.C. § 371. Claddis Arrington was also convicted of distributing heroin, 21 U.S.C. § 841, and conspiring to intimidate a prospective witness, 18 U.S.C. § 371. We affirm all of the convictions.

Because none of the appellants argues that the proof was insufficient to support the jury's verdicts, an extensive recital of the facts is unnecessary. Briefly stated, the Government proved the existence of a large heroin and cocaine conspiracy operating principally around 143rd and 144th Streets in Harlem. The conspiracy was headed by Brooks Davis; Arrington was a street dealer; and Mary Davis was a supplier of customers and a procurer of drugs. We will elaborate on the above facts only as needed in the following discussion of the alleged errors that appellants urge as grounds for reversal.

JURY SELECTION

Prior to sending a group of talesmen to Judge Griesa's courtroom, the jury clerk did not discuss the instant case in any manner except to inform the group that the trial was expected to last approximately six weeks. In accordance with instructions given him by Judge Griesa, the clerk inquired concerning possible hardship and excused two talesmen who said that service for that length of time would be a hardship. Relying principally upon the Supreme Court's subsequent decision in *Gomez v. United States*, 490 U.S. 858 (1989), appellants contend that this constituted prejudicial reversible error. We disagree.

In *Gomez*, the Court held that the voir dire of a jury had to be conducted by a judge rather than a magistrate. In support of this holding, the Court said that voir dire is a critical stage of the trial during which the defendant has a constitutional right to be present. *Id.* at 873. However, voir dire is not an issue in the instant case. Voir dire is conducted by the judge in the courtroom, not by the clerk in the central jury room. *See United States v. Wedalowski*, 572 F.2d 69, 74 (2d Cir. 1978). In the instant case, the jury clerk excused two talesmen before they came to the courtroom.

This was not constitutionally forbidden. *See Fay v. New York*, 332 U.S. 261, 271 (1947). Neither was it forbidden by the Jury Selection and Service Act of 1968, Pub. L. No. 90-274, 82 Stat. 53 (codified as amended at 28 U.S.C. §§ 1861-78 (1988)), either before or after the Act was amended. Although the Act as originally enacted did not provide expressly for pre-voir dire excuses by the jury commissioner or clerk, most courts that were asked to rule on the issue held that such excuses on hardship grounds were not improper. *See United States v. Ramirez*, 884 F.2d 1524, 1530 n.6 (1st Cir. 1989); *see also United States v. Calaway*, 524 F.2d 609, 615-16 (9th Cir. 1975), *cert. denied*, 424 U.S. 967 (1976). However, to remove any uncertainty that might exist on this issue, Congress, in the Judicial Improvements and Access to Justice Act of 1988, Pub. L. No. 100-702, 102 Stat. 4642, 4657, amended section 1866(c) to provide that "any person summoned for jury service may be (1) excused by the court, or by the clerk under supervision of the court if the court's jury selection plan so authorizes, upon a showing of undue hardship or extreme inconvenience, for such period as the court deems necessary . . . ." The purpose of this change

was "to promote administrative convenience and reduce unnecessary burdens placed upon the courts." H.R. Rep. No. 889, 100th Cong., 2d Sess., *reprinted in* 1988 U.S. Code Cong. & Admin. News 5982, 6024. The report continues, "[t]o avoid needless challenges and to enhance administrative convenience, this section thus permits, although it does not require, courts to authorize clerks to grant temporary excuses." *Id.*

The Southern District's Amended Plan for the Random Selection of Grand and Petit Jurors, adopted pursuant to the Jury Selection and Service Act, provides that "any person summoned for jury service may be (1) excused by a district judge or the Clerk of Court upon a showing of undue hardship or extreme inconvenience, for such period as the judge or the Clerk of Court deems necessary . . . ." The Plan differs from the Act in that it does not include the words "under supervision of the court." However, it is clear that the clerk here was in fact acting "under supervision of the court" since he was acting pursuant to express instructions from the trial judge. We need not decide, therefore, whether the Act would permit a jury clerk to excuse talesmen prior to voir dire in the absence of such instructions, or whether the Southern District Plan is consistent with the Act in this respect.

Moreover, even if the excuse of the two jurors was error, it was harmless error. Although appellants argue that under *Gomez* harmless error analysis does not apply, the Court in *Gomez* relied on the distinction between voir dire, which is the jurors' "first introduction to the substantive factual and legal issues in a case," and a mere "administrative impanelment process." *Gomez, supra*, 490 U.S. at 874-75. As stated

above, in this case the trial judge conducted the entire voir dire. Excusing two potential jurors without exposing any jurors to the substance of the case was part of the "administrative impanelment process," and any error in this procedure was harmless.

Appellants have made no contention or showing that the clerk discriminated in his selection of jurors or that as a result of his actions the panel from which the jury was drawn did not represent a cross section of the community. There is no merit in appellants' challenge to the clerk's action.

DOUBLE JEOPARDY

On January 23, 1989 this court affirmed Judge Griesa's order denying appellants' motion to dismiss the charges against them on the ground of double jeopardy. *See United States v. Arrington*, 867 F.2d 122 (2d Cir.), *cert. denied*, 110 S. Ct. 70 (1989). Since the facts appertaining to that ruling are set forth in our opinion, 867 F.2d at 123-30, they need not be recounted here. Appellant Mary Davis contends that the January 1989 decision should have no binding effect because the panel on that appeal was misled by a Government assertion that she would be tied directly to a plot to intimidate government witnesses. Appellant is mistaken; that panel was not misled.

We held that the defendants were not charged with conspiracy to bring about a single illegal result, but with a large scale narcotics distribution organization whose goals would be furthered by the silencing of witnesses. *Id.* at 130. Testimony concerning threats against such witnesses would be admissible against Mary Davis as a

coconspirator in the continuing large scale conspiracy that encompassed the threats. *Id.* Because one of the alleged participants in the attempt to intimidate witnesses had acted as lead defense counsel at appellants' original trial, we held that a mistrial was manifestly necessary as to Mary Davis, as well as her coconspirators, a conclusion that in no way turned on a proffer of evidence tying her directly to witness intimidation. *Id.* Appellant has no valid claim of double jeopardy.

THE PLEA ALLOCUTIONS

Four of the original defendants charged with drug conspiracy pleaded guilty. Keith Greene pleaded guilty on December 16, 1987; Henri Mitchell pleaded guilty on January 4, 1988. Anthony Walker pleaded guilty on March 7, 1988, and Clarence Dixon pleaded on March 16, 1988. All four were serving their sentences when the second trial took place.

These four men were linked to the charged narcotics conspiracy by considerable proof at trial and were mentioned frequently during the trial as participants in drug transactions. However, when the prosecutor contacted the attorneys for the four men to inquire about their clients' willingness to testify, he was informed that each of the clients would invoke his Fifth Amendment privilege if called as a witness. The Government then sought permission from the district court to use the prisoners' guilty plea allocutions as statements against interest pursuant to Fed. R. Evid. 804(b)(3). The district court accepted the prosecutor's representations as reliable and, after redacting all references to the named defendants, admitted the redacted allocutions. As a condition for such admission, the district court directed the Govern-

ment to give defense counsel all statements made by the four absent prisoners in order to ensure full and fair impeachment of the absent declarants.

In admitting the redacted allocutions, the district court charged the jury as follows:

> You may consider these statements as evidence of the activities of the people who made the statements, and that is relevant to the case. You may consider the evidence of these statements if you feel that they are probative in this direction, you may consider them on the issue of whether there was or was not a conspiracy to sell heroin and cocaine and whether the sales of heroin and cocaine went on at the locations contended by the government.
>
> The question of whether any defendant here was a member of a conspiracy, whether any defendant here sold cocaine or heroin or both, that is an issue on which you will have to rely on other evidence. There is no evidence in these statements naming those defendants or any of them.
>
> If you find the heroin sales and cocaine sales were going on in that location, and if you find that there was a conspiracy, then the question of whether any defendant here was engaging in selling, any defendant here was a member of such a conspiracy, that would have to be proved entirely by other evidence and there is nothing in here that proves that one way or the other.

In determining whether the admission of the guilty plea allocutions of these four former defendants constituted reversible error, a good starting point is the following statement taken from our decision in *United*

States v. Winley, 638 F.2d 560, 562 (2d Cir. 1981), *cert. denied*, 455 U.S. 959 (1982):

> It is hard to conceive of any admission more incriminating to the maker or surrounded by more safeguards of trustworthiness than a plea of guilty in a federal court, particularly when, as here, the facts elicited in the allocution are buttressed by the testimony of other witnesses.

Because Judge Griesa himself conducted the allocutions of the four pleading defendants, he had intimate knowledge of the allocutions' trustworthiness and their lack of susceptibility to challenge. He also was in the best position to rule on whether the pleading defendants were privileged from testifying concerning the subject matter of their statements. These factors must be borne in mind in deciding whether Judge Griesa departed from the requirements of Fed. R. Evid. 804 and, if so, whether the departure was harmless error.

Although the record is clear that Judge Griesa found the pleading defendants to be unavailable, appellants contend that Judge Griesa could not properly have made this ruling without these defendants having appeared before him to claim the privilege. Although in the ordinary case this would have been the preferred practice, personal appearance and claim of privilege were not the *sine qua non* of its grant in the instant case. In this respect, subdivisions (a)(1) and (a)(2) of Rule 804 must be distinguished. Subdivision (a)(2) identifies as "unavailable" a witness who persists in refusing to testify despite an order of the court to do so. This obviously contemplates presence of the witness in court. Subdivision (a)(1), on the other hand, identifies as

"unavailable" a witness who is exempted by a court ruling on the ground of privilege. Such a ruling can be made, as in the instant case, with or without the witness being haled into court. *United States v. Kehm*, 799 F.2d 354, 361 (7th Cir. 1986); *United States v. Georgia Waste Sys., Inc.*, 731 F.2d 1580, 1582 (11th Cir. 1984); *United States v. Young Bros., Inc.*, 728 F.2d 682, 690-91 (5th Cir.), *cert. denied*, 469 U.S. 881 (1984); *United States v. Brainard*, 690 F.2d 1117, 1123-25 (4th Cir. 1982), *cert. denied*, 471 U.S. 1099 (1985).

Appellants have suggested no reason why Judge Griesa should not have believed the representations of the attorneys for the incarcerated defendants concerning their clients' intentions to rely on their Fifth Amendment privileges. The law does not require the doing of a futile act. *Ohio v. Roberts*, 448 U.S. 56, 74 (1980); *United States v. Casamento*, 887 F.2d 1141, 1169-70 (2d Cir. 1989), *cert. denied*, 110 S. Ct. 1138 (1990). We conclude that both the prosecution and Judge Griesa acted reasonably and in good faith and that Judge Griesa's finding of unavailability based on his ruling concerning testimonial privilege has ample support in the record.

Assuming for the argument that Judge Griesa should have rejected the representations of counsel for the four incarcerated defendants and ordered the defendants brought into court from their respective correctional institutions in order for them to personally claim their privilege, we hold that under the circumstances of this case Judge Griesa's failure to do so was at most harmless error. It is clear beyond cavil that the doctrine of harmless error is applicable in cases involving the confrontation clause of the Sixth Amendment. *See Delaware v. Van Arsdall*, 475 U.S. 673, 680-84 (1986). All

references to appellants were redacted from the challenged allocutions. They were received only for the purpose of showing the existence of a conspiracy, not appellants' membership in it. In this respect, the testimony was substantially cumulative in nature. As one defense counsel stated to Judge Griesa, "The government certainly doesn't need this testimony to establish that a drug conspiracy existed." We agree. This being so, we are satisfied that, if the district court erred, the admitted evidence was neither crucial to the Government's case nor devastating to the defense and the error was harmless beyond a reasonable doubt. *See Casamento, supra*, 887 F.2d at 1179-80; *United States v. Southland Corp.*, 760 F.2d 1366, 1377 (2d Cir.), *cert. denied*, 474 U.S. 825 (1985); *United States v. Wright*, 588 F.2d 31, 38 (2d Cir. 1978), *cert. denied*, 440 U.S. 917 (1979).

THE *BRADY* CLAIM

As so often happens in cases of this sort, one of the Government witnesses, Demetrice Hamm, had an unsavory record. He was cross-examined at length about his own criminal activities, his mental health, and the money he had received from the DEA and also from the Marshals Service as part of the United States Marshals Service Witness Program. As a participant in that program, Hamm was required to read and sign a "Memorandum of Understanding" concerning his responsibilities under the program and the protection he might expect. 18 U.S.C. § 3521(d); *see Franz v. United States*, 707 F.2d 582, 590-91 (D.C. Cir. 1983).

Several days after the jury began its deliberations, the Government was informed by the Marshals Service that

Hamm had indicated in his Memorandum of Understanding that he expected to receive a percentage of assets seized. The Memorandum also stated, however, that Hamm understood and acknowledged that any such promises would not be honored by the Marshals Service. Upon receipt of this information, the Government immediately informed defense counsel, who in turn requested that the information be given to the jury. The court demurred, however, stating that simply giving the form to the jury would not provide the jury with a fair indication of the facts surrounding its execution. The court also observed that information surrounding Hamm's expectation would have little import, significance, or weight. The parties consulted, however, and agreed that a stipulation might be sent to the jury which included statements that, if Hamm were called to testify, he would say that he "has no expectation, and never had any expectation, of receiving a percentage of assets seized in the case"; that "the government has no agreement with Hamm with respect to the receipt of seized assets, and has promised him no percentage"; that "Demetrice Hamm received nothing, and has not applied for anything." However, before this stipulation could be prepared and approved by Judge Griesa, the jury announced that a verdict had been reached.

Appellants do not challenge the accuracy of the stipulation. Instead, they argue the existence of a prejudicial *Brady* violation [*Brady v. Maryland*, 373 U.S. 83 (1963)] almost as if the stipulated facts did not exist. They say that, "[i]f the stipulation had gone into [sic] the jury, the *Brady* violation would have been ameliorated, not rectified" (Davises' Reply Brief at 22). This indicates a basic misunderstanding of *Brady*. *Brady* requires a reversal only if there is "a reasonable probability that,

had the evidence been disclosed to the defense, the result of the proceeding would have been different." *United States v. Petrillo*, 821 F.2d 85, 88-89 (2d Cir. 1987) (quoting *United States v. Bagley*, 473 U.S. 667, 682 (1985) (opinion of Blackmun, J.) and *id.* at 685 (White, J., concurring)). We are completely satisfied that, had all the facts been presented to the jury, there is no likelihood whatever that the defendants would not have been convicted.

REMAINING ARGUMENTS

Most of appellants' remaining arguments deal with evidentiary rulings of the district court, which, as often has been stated, are to a large extent discretionary in nature. *See, e.g., United States v. Robinson*, 560 F.2d 507, 512-16 (2d Cir. 1977) (en banc), *cert. denied*, 435 U.S. 905 (1978); *Schiavone Constr. Co. v. County of Nassau*, 717 F.2d 747, 749 (2d Cir. 1983). They do not merit detailed discussion. Statements of appellants' coconspirators, Williams, Joyner, Hamm, and Centano, made during the course of and in furtherance of the conspiracy in which they were engaged, were admissible. There was no improper limitation on the cross-examination of any of the Government witnesses. The district court properly excluded the hearsay within hearsay, or double hearsay, statement of Anthony Walker's mother, allegedly made to a confidential informant who in turn reported it to DEA Special Agent D'Erchia, because each part of the combined statements did not fall within an exception to the hearsay rule. *See United States v. Cruz*, 894 F.2d 41, 44 (2d Cir.), *cert. denied*, 111 S. Ct. 107 (1990); *Felice v. Long Island R.R. Co.*, 426 F.2d 192, 196-97 (2d Cir.), *cert. denied*, 400 U.S.

820 (1970); *United States v. Dotson*, 821 F.2d 1034, 1035 (5th Cir. 1987); Fed. R. Evid. 805. The district court did not err in admitting pretrial consistent statements of Joyner and Hamm. *See United States v. Pierre*, 781 F.2d 329, 330-31 (2d Cir. 1986). The district court's decision to preclude cross-examination of Harper and Hamm concerning arrests unrelated to the instant case was well within its discretion, and appellants have shown no prejudice as a result of the district court's rulings. The district court's missing witness instruction was substantially correct. *See United States v. Torres*, 845 F.2d 1165, 1169 (2d Cir. 1988). Proof of Arrington's sales of cocaine during 1985 and 1986 was admissible as evidence indicative of a conspiracy and his participation in it.

We have considered all of appellants' arguments, and the judgments of conviction are affirmed.

UNITED STATES COURT OF APPEALS
FOR THE
SECOND CIRCUIT

As a stated term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse, in the City of New York, on the 22nd day of April, One Thousand Nine Hundred and Ninety-One.

UNITED STATES OF AMERICA,

Appellee,

v.

CHARLES WILLIAMS, et al,
Defendants,

CLADDIS ARRINGTON, MARY FERGUSON, a/k/a "MARY DAVIS," a/k/a "MARY JOHNSON," and BROOKS GREGORY DAVIS,

Defendants-Appellants

DOCKET NUMBERS
(89-1504 L),
89-1522, 89-1523
89-1524

A petition for rehearing containing a suggestion that the action be reheard in banc having been filed herein by

Appellants BROOKS GREGORY DAVIS and MARY FERGUSON

Upon consideration by the panel that heard the appeal, it is

Ordered that said petition for rehearing is denied.

It is further noted that the suggestion for rehearing in banc has been transmitted to the judges of the court in regular active service and to any other judge that heard the appeal and that no such judge has requested that a vote be taken thereon.

/s/ Elaine B. Goldsmith
ELAINE B. GOLDSMITH
Clerk